IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

PETTER INVESTMENTS, a Michigan corporation doing business as Riveer,

Plaintiff,

vs.

HYDRO ENGINEERING, a Utah corporation, et al.

Defendants.

CASE NO. 2:14-CV-45DB

BEFORE THE HONORABLE DEE BENSON

November 13, 2014

Motion Hearing

A P P E A R A N C E S

For Plaintiff: STEPHEN M. LOBBIN (Telephone)
2020 Main Street
Suite 600
Irvine, California

MARK FORD
1389 Center Drive
Suite 300
Park City, Utah

For Defendant: MARK MILLER
BRETT FOSTER
222 South Main Street
Suite 2200
Salt Lake City, Utah

Court Reporter: Ed Young
351 South West Temple
Room 3.302
Salt Lake City, Utah 84101-2180
801-328-3202

November 13, 2014 2:30 p.m.

P R O C E E D I N G S

THE COURT: Good afternoon.

We'll turn to Petter Investments, Inc. doing business as Riveer, plaintiff, versus Hydro Engineering, Inc. and California Cleaning Systems. The case number is 14-CV-45.

For the defendants we have here Mr. Brett Foster and Mr. Mark Miller.

Do I have that right?

MR. MILLER: That is correct.

THE COURT: For the plaintiff I know I have Mr. Lobbin on the telephone.

Can you hear us, Mr. Lobbin?

MR. LOBBIN: Yes, I can. Thank you.

THE COURT: That is Mr. Stephen Lobbin.

Is this Mr. Ford?

MR. FORD: It is, Your Honor.

THE COURT: Mr. Mark Ford is here in person.

This is a hearing that the Court scheduled on its own request a couple of days ago after reading a motion that has been filed by the plaintiff seeking additional time to conduct discovery and to be relieved of the current deadline for the initial discovery phase, which is the 1st of

December, as I recall.

That is what I wanted to have a hearing on today and see if we can't get things moving. I have read all of the briefs. I know also that there is a pending motion for partial summary judgment which is scheduled to be argued next Thursday, I think. I have taken some time to acquaint myself generally with what is being presented in those motions brought by the defense, but I have not concluded my reading of those. It just made sense to me to try to give you some understanding today, and I would like to rule from the bench if I can, so that you know what the framework is.

Before I hear from either Mr. Lobbin or Mr. Ford on the matter, it might be helpful for you to hear my inclination.

From what I have read in the briefing that has been submitted, it appears to me that the plaintiff has not been diligent in pursuing its discovery efforts. The eight-month period is consistent with the local rules of this court in this type of a case. It appears to me that the plaintiff has known about this deadline for months. I don't understand why the plaintiff has not been more diligent in pursuing discovery.

I know there were objections raised by the defense to certain requests for production of documents because the defendant claims that they are not relevant and that they

deal with matters that are outside of the realm of the allegations in the complaint.

Those are the kinds of things that happen all the time in discovery and they need to get sorted out. What I really don't understand is why the plaintiff has not taken more depositions than just the one deposition they took last April. The plaintiff has known about this deadline, and the most curious thing to me is why, when the defendants filed motions for summary judgment in July or June, whenever it was, that the plaintiff responded in July with a motion under Rule 56(d) indicating that they would need more discovery before they could respond to the summary judgment motions. The curiosity comes from the fact that that clearly tells me that the plaintiffs knew that they needed factual material or wanted factual discovery from the defendants as early as last July, and yet waited until just a few days ago or a week or two ago to file the current motion seeking an extension of a deadline that is only about ten days from now.

All of that tells me that the plaintiff, and maybe you have been busy with your other case involving Target, I don't know, but I'm inclined not to grant your motion for an extension of time.

But having said that, I recognize that you have indicated in your papers that there are four or five or six

or seven depositions that you feel have to be taken, and that that is going to pose a real hardship if you need to get all of those taken in the next ten days, and especially when I think there is a deposition or maybe two that have been already scheduled by the defendants and those are coming up relatively soon I think.

I have a fairly good understanding of the background. I just need some explanation from the plaintiff that might cause me to give you some relief, but it is going to have to be better than what I have read in the briefs.

Who is going to address this for the plaintiff, Mr. Lobbin or Mr. Ford?

MR. LOBBIN: Thank you, Your Honor. Mr. Lobbin here.

Unfortunately, I am in a hospital waiting room right now. My daughter, my three-year-old is having her tonsils and adenoids out, and because there may be an interruption and for clarity of communication, I would like to have Mr. Ford --

THE COURT: Okay.

MR. LOBBIN: -- address the Court.

THE COURT: Well, he is here and he is up at the lectern and we'll let him go forward.

If there comes a time, Mr. Lobbin, when you have to leave, feel free, of course, and tell us if there is

something that you're not able to hear and understand. Okay.

MR. LOBBIN: Thank you, Your Honor.

I certainly wanted to be on the call to answer any clarifying questions that come up and I am available for that as well.

THE COURT: I will hear now from Mr. Ford.

MR. FORD: Thank you, Your Honor.

As you indicated correctly, the close of discovery in this case is set for December 1st which, if my math is correct, is two weeks from this coming Monday. Really the reason for the motion is an extension of the discovery deadline in order to complete several important tasks. One of those is to complete depositions of Hydro witnesses, specifically 30(b)(6) depositions, and the second reason is to conduct and complete some third-party discovery that we have not been able to complete as of yet.

Steve can correct me if I am wrong, but I think there are eight different third parties that we are seeking discovery from. Several of those are governmental entities. We have run into several roadblocks in terms of getting these governmental entities to produce documents and make a witness available for deposition. There is lots of time-consuming red tape and bureaucratic issues that we have been having to deal with for several months now.

Turning to the first issue regarding the depositions of Hydro's witnesses, it is true this case has been pending for a while and that we have known about this December 1st deadline since the scheduling order in this case came out, but I think it is important to remember that this case started -- these two parties, Hydro and Riveer, have been in lawsuits for a long time.

At the initial point in this case, the parties stipulated that -- let me make sure I get this correct. They stipulated that all of the documents and depositions and testimony and exhibits that were produced in three other cases between the parties would be deemed produced in this case. That resulted in the production of hundreds of thousands of pages of relevant documents from Hydro's files as well as testimony from dozens of prior depositions. When we first started the discovery phase in this case, we had to take all that information and assimilate it and understand it, and what do we have and what do we still need in order to proceed in this case.

Six weeks into the discovery period we served our first set of discovery requests. I feel we were diligent during that time to figure out what it was that we had and what is relevant from the other cases that is deemed produced in this case and what more do we need so that we are not asking for things that we may already have. Like I

said, six weeks after the discovery period initiated we served our first set of discovery.

Now, in response to that discovery there has been quite a bit of back and forth between the parties over what is relevant and what is not relevant and have you produced everything that you should have produced? Are your interrogatory responses complete? In fact, the parties are still continuing to negotiate over whether the production and interrogatory responses are complete.

In fact, I think just this morning I saw an e-mail from Mr. Lobbin to Mr. Miller regarding some interrogatory responses that they have indicated that they would be supplementing but that they have not supplemented yet. What is critical in this case is in the last three weeks Hydro has produced to Riveer over 10,000 pages of documents. We should be allowed the opportunity to get that information and understand it and digest it and read it and incorporate it into the deposition outline in a meaningful way.

We shouldn't be forced to have to take a deposition either without having complete production from Hydro, or having to take a deposition the day after we have received 10,000 pages of documents. Like I said, that production -- I can get you the exact amounts and the exact dates. Hydro produced 10,316 pages on October 20th, and they produced another 167 pages on October 29.

Now, what else has been happening in this case from the time that the discovery period opened until now? Well, Hydro has also filed three motions for summary judgment. We have responded to those motions. We have also filed Rule 56(d) motions. There has been a lot that has gone on in this case during the discovery period. It is not as if the plaintiff has been sitting back and watching things happening and been doing nothing in this case.

Quite the opposite. We have been very active in responding to their summary judgment motions and filing our own 56(d) motions and also pursuing discovery that we feel is necessary. I could be mistaken, but I believe there was also a motion to compel filed during that time. Anyway, to say the least, this has been a very, very active case, one of the most active cases during discovery in terms of motion practice that I have been involved in. There has been a lot going on, especially with the three summary judgment motions.

In my opinion the plaintiff has been diligent in seeking this discovery. We have had numerous phone calls and conversations with the defendants to try to work out these issues and to try to avoid the necessity of a motion to compel. And, like I said, we have been successful in part, and part of that success has been this very recent production of nearly 10,500 documents from the defendants.

From that standpoint, the depositions of Hydro's witnesses, you know, we need an opportunity to be able to read that information and prepare adequately our depositions.

With regard to the third-party witnesses, there really was not much we could have done to get that ball rolling any sooner. We learned about these individuals from Hydro's -- I believe all of them are Hydro customers, and we didn't know who all their customers were until we got the production and could confirm who their customers were to identify the appropriate people to seek third-party discovery from. We have been working on these third-party subpoenas for several months now.

Like I said, we have just been hit with a lot of red tape and problems from these third parties in actually getting the information and the documents that we have asked for and the witness that we have also asked for.

THE COURT: Give me an example.

MR. FORD: I'm sorry? Say that again. I didn't hear you.

THE COURT: Give me an example.

MR. FORD: Sure.

Steve, I know you sent me an e-mail this morning, an e-mail that you recently received.

MR. LOBBIN: Yes. I'm sorry. I was trying to find a quiet space here.

With regard to the third-party discovery, Your Honor, the intention of getting documents from Hydro was to figure out whether and which third parties we had to bother for discovery. My practice is generally to get discovery from the parties before you go out and bother these third parties who are going to resist discovery in the first place. So we have been pursuing third-party discovery since September, because it was clear that Hydro was stalling and not producing their documents and they just produced two weeks ago these 10,000 pages.

While we have been waiting for Hydro to finish the document production we have been pursuing these third parties, and all we're asking for is a little more time for the third-party discovery. We don't need any more party discovery. We have got the depositions, Hydro and Riveer have agreed on dates and we're working on dates for the party depositions, and we're finished with party discovery, written discovery, and all we are really asking for here is a little more time to complete our third-party discovery. We have been at it for two and a half months and we need another month and we'll be done.

We are not asking for, you know, a broad extension of discovery. All we're asking for here is a little more time to finish what we started on the third-party discovery and we don't need any more time for party stuff.

THE COURT: How do these depositions that you want to take relate to this extension? Do they have to be done by the 1st of December? Help me understand that.

MR. FORD: With regard to the party depositions, it appears that Hydro has taken the position that the party depositions -- it is okay for those to happen after the close of discovery because --

THE COURT: After December 1?

MR. FORD: That is exactly right.

THE COURT: Do you agree with that?

MR. MILLER: Yes.

We were willing to schedule those during the first two weeks of December to accommodate everybody's schedules, so those are being scheduled right now.

MR. FORD: What is interesting is that with regard to the third parties, Hydro has taken the position that, no, we are not going to allow those to happen after the close of discovery. In an e-mail from November 5th --

THE COURT: Allow what?

MR. FORD: For the depositions of third parties to happen after the December 1st close of discovery date. What Hydro has said in the e-mail on November 5th was that with regard to third parties, we expect any depositions to take place prior to the discovery cutoff date. I am not quite sure why it is okay for party depositions to happen after

the close of discovery, but they have taken sort of a hard-line on nonparty depositions. But, in any event, you know, like I said, I really feel like we have been diligent in trying to schedule these third-party depositions. It has just been difficult.

THE COURT: All right. Let me hear from Mr. Miller.

Thank you.

MR. MILLER: Thank you, Your Honor.

It sounds like the only issue in this motion now is just this third-party discovery. Mr. Lobbin indicates that they don't need anything more from my client, and I think we have been very generous to allow scheduling of our party depositions beyond the deadline to accommodate everybody. It is only a couple weeks, no big deal.

With regard to this third-party discovery, I disagree that they have been diligent in pursuing that and that it would be okay to go out and bother some of our customers and things like that after the deadline. As Mr. Lobbin indicated, they didn't start sending subpoenas to anybody until September. In fact, September 23rd was the first time they sent some subpoenas to us for the prior notice function that they are required to do.

And, by the way, those subpoenas were sent to us September 23rd, and that is prior to I believe our most

recent document production, so they can't blame that on saying we couldn't have sent those subpoenas any earlier until you gave us the most recent document production. The subpoenas they have been pursuing started before the most recent document production. If you look at the time line, these subpoenas were sent over six months after discovery started in an eight-month discovery period. They could have sent them in April, May, June, July, August or early September and they didn't. So they begin third-party discovery six months into an eight-month discovery deadline.

The third parties they are going after are some military entities, and to subpoena the military takes a long time, and these are entities they knew they could have subpoenaed or were relevant to the case way, way back at the time. They could have started early and gone through this process they are trying to go through. The other third parties are entities that we identified in our invalidity contentions where we talk about a prior sale of a wash rack.

They recently sent an e-mail saying, oh, we might want to depose these three entities or people. They were identified as relevant to our invalidity contentions back in May, and this is the first time they have reached out to us and said we may want to depose these guys too. I don't know why they didn't work towards deposing them in May, June, July, August or September or October.

With regard to third-party discovery, Mark says if it is okay to extend the party depositions a little bit, why not third party? Well, I think we are being kind and we're being accommodating to go ahead and schedule these witnesses from our company out of time, but that does not mean we have some obligation to say you can take third-party discovery however you want, it is okay that you started six months into the game, and go ahead and subpoena our customers and bother them and that is going to hurt our relationship and, you know, they had adequate time and they waited too long. I don't think third-party discovery is justified.

Mr. Ford also indicated that there is -- he tried to suggest there are some unresolved issues and that we are still negotiating. There was an e-mail this morning talking about unresolved issues. I did get an e-mail from Mr. Lobbin this morning. What he said is there is a range, a Bates number range in our document production that he said did you ever figure out what that was, and we have already told him what that was. We sent them a privilege log. Those are privileged documents that were withheld and they are identified on the privilege log. The other thing they have raised are interrogatories eight and nine, and those interrogatories asked for the identity of witnesses that are knowledgeable about these sales transactions.

In our responses we referred to documents under Rule 33(d) to say you'll find out who is participating in these documents. There is e-mail communications and things that show who in our company is knowledgeable. Then when Mr. Lobbin followed up with us weeks ago on these issues, in the telephone call we informed him it is Cary Smith and Doug Felice and Alan McCormick, who they have already deposed, and we told them on the phone that is who it is. If you want us to just say that in the interrogatory response we can, but that is who it is, and that is who we have scheduled for depositions the first two weeks of December. So the issue they sent an e-mail on this morning to create the idea that there are some unresolved issues is not true. None of the issues that he raised in the e-mail today are unresolved.

The 10,000 pages we recently produced, I want to clarify one thing. In their reply brief they try to make that sound bigger than it is. They claim it is 76 percent of our total production. Well, it is not, because they are ignoring the production we made at the beginning of the case incorporating all of the documents from the other cases that are relevant and that show our design history, that show Riveer's design history, that testimony. It is 1.5 percent of the total document production we have made. 10,000 pages of documents in this day and age, Your Honor, is not

difficult to review. It does not take a lot of time.

You can review that and get ready for a deposition, and they have proven that by scheduling these depositions in early December. That is not an issue.

I don't think that filing and responding to summary judgment motions during discovery absolves anybody of their responsibility to pursue discovery by writing a letter, getting on a phone call, serving some more document requests, and none of that has to be supplanted by just having to file another brief. They have got two good law firms on this case. They have not been diligent and there is no justification for extending the deadline beyond December 1st, especially with regard to just allowing them to just go out and do some third-party discovery that we don't think is that necessary anyway.

We certainly don't want to have to deal with third-party discovery and subpoenas beyond December 1st or depositions of third parties beyond December 1st.

THE COURT: Thank you, Mr. Miller.

Anything to respond?

MR. LOBBIN: This is Steve Lobbin here. If I may respond, Your Honor, just briefly to a couple of the points here. I found a quiet space here.

Regarding Hydro's depositions of Riveer's folks, they did serve notices a couple weeks ago and we have agreed

to schedule those depositions after December 1st. It is not just us that needs to go a little bit past December 1st to complete these party depositions.

The second point is Mr. Miller thinks that we could have taken a better discovery approach at the beginning of the discovery period by not only serving party discovery but serving third-party subpoenas in April. To me it is just not consistent with the way I practice, and I don't think it is consistent with the federal rules to start serving third-party subpoenas for documents and depositions when that information should be available from the party that is involved in the lawsuit.

My approach to litigation has always been that if your opponent should have the documents you're looking for, and if your opponent should be able to identify in their discovery who the key people are that you need to depose, well, then you engage in good faith in your party discovery and you figure out who you really need to talk to and you figure out what the documents are that you really need, and then, if necessary, after that you go out and bother third parties with the subpoena process under Rule 45.

Your Honor, you know, if I had known that the tactics that they are employing in this litigation were going to be to delay and stall the document production until two weeks before the end of discovery and give us 10,000

pages of documents, then maybe he is right and I should have served the third-party discovery sooner than September. I was not expecting that.

Your Honor, we are in the position of having the third-party discovery that we had to serve because we were not getting the information that we needed from Hydro. Why weren't we getting that information? Because they were sitting on it until two weeks ago. So now we are in the position of having government entities, and they say it is their customers, well, it is our customer too. These two companies are competitors in a market and they share a lot of customers and they go after the same customers. These customers, government entities and others, are the third parties that we're seeking documents from and that we'll seek depositions from in short order.

All this motion boils down to is will this Court allow us just a little more time to complete our document gathering and to schedule these third-party depositions. We don't need any more time for party discovery. So that is really what it boils down to. We don't think it is improper for us to make that request, and we think that we can complete that in very short order and that is why we brought the motion.

If Mr. Ford has anything else to add on some of the other points, that would be fine.

MR. FORD: The only thing I was going to add, your Honor, is just the fact that --

THE COURT: I think he can hear you better there.

MR. LOBBIN: The only thing I would add, Your Honor, is that the extension that we have requested is not going to have any effect on any other deadlines in this case. All the other deadlines -- we are not asking that this have sort of a domino effect on the other deadlines in this case and everything else can proceed as it is in the scheduling order.

THE COURT: I have not heard any specificity about what it is that you really feel that you need to do by way of third-party depositions.

MR. LOBBIN: Your Honor, this is Steve Lobbin and I can address that.

There are two basic claims in this case. The first is for patent infringement and the second is for misrepresentations concerning these contract bids that the parties compete with each other against. The third parties are the companies that award these bids. We need the documents related to those bids and related to those contracts, which presumably Hydro has now produced two weeks ago, in which the same documents are also in the possession of these third parties, which we are seeking through the subpoena process.

Now that we're finally getting some of these documents, we need to take depositions of certain of these third parties, not all of them, but certain of the third parties to answer questions regarding the documents, to answer questions regarding the bid process for those contracts, and to answer questions regarding how the bids were evaluated and how those contracts were awarded, and basically just to confirm our position which justified bringing those misrepresentation claims under the Lanham Act for how these third parties handled these contracts and these bids and these awards. That is what it is all about.

The patent issues don't have anything to do with it. The patent issues -- we are ready to go on that. We don't need any more discovery on those issues. That is all party discovery.

THE COURT: I still don't have any specificity. Whose deposition do you want to take of a third party? Can you even give me a name or a title? Mr. Lobbin, Mr. Ford, either one of you --

MR. LOBBIN: I'm sorry, Your Honor. There is some noise that is going on here.

The third parties that we need depositions of are the Marine Corps at Camp Lejeune, the Army in Barstow, California, the Army at Fort Riley, Kansas -- (inaudible) -- which is in Houston, the F.D.I.C., which is in Washington,

D.C., and C.H.D.I., Inc., which is also in Washington, D.C. Those are the third parties that we'll be subpoenaing for depositions.

THE COURT: Tell me, how many of those have you taken steps to subpoena a witness?

MR. LOBBIN: I have been discussing with their counsel what documents we will be getting in short order, and once I get those documents I will be scheduling the depositions. I didn't want to impose the burden of deposition subpoenas until I got the documents to make sure that they have some responsive information, so those will be going out today or tomorrow if it would help this situation we're discussing here. But I was planning on getting those subpoenas out as soon as I got the documents.

THE COURT: As soon as you get the documents? I thought that you already had the documents.

MR. LOBBIN: I have some. I have some, but not all, so within this week those deposition subpoenas will go out.

THE COURT: Okay. Any response to that, Mr. Miller?

MR. MILLER: Yes.

Your Honor, the third parties they have identified are not third parties that suddenly became relevant in this case very recently. Mr. Lobbin says his style of litigation

is let's see what we can get from the defendant or the parties before we get to the third parties. That means you plan your discovery activity accordingly based on the approaching deadline, and you say if that is the case, we need to make sure that we know what we're going to get from Hydro by this date and start third-party subpoenas.

In our briefing we highlight that there is this three plus month lag between them saying we think we're going to need to follow up on some of your objections and then actually following up. If they had been diligent, the most recent production likely would have been made in July and they could have started subpoenaing third parties in July.

Now we find out he wants to subpoena them for depositions and has not yet even served a deposition subpoena. He served document subpoenas on them, but why not serve the deposition at the same time to expedite the matter? There is not a single third-party deposition subpoena that has actually been prepared on their side. We have not seen notice of one and we are required to get notice of them before they serve them.

The only subpoenas we have seen are requesting documents from third parties. Whatever subpoenas they have served to get documents from third parties, that is great, and whatever documents they get from those that is great,

and if documents come in after the deadline, that is fine. They did their stuff early, but to allow them to start serving third-party subpoenas now for the first time and schedule depositions probably in January or February, that is going to -- it does affect the other deadlines in the case. When you have got open discovery, the record changes and your ability to move for summary judgment is impacted and everything gets impacted. Maybe not a trial deadline, but how soon my client can pursue summary judgment is certainly impacted on some of these claims that may still be there following whatever motions we currently have on file.

I agree with the Court on the question on no specificity. They rely on their Rule 56(d) motions to show some sort of diligence, but the law in the Tenth Circuit is pretty clear. Rule 56(d) requires you to be very specific. You have to say this is the fact we think that we need. This is where we think we can get it. Here is our plan to get it. All they really come forward with is there is a lot more discovery to do from some of these entities and that is it. That does not satisfy Rule 56(d) and it does not satisfy their burden here.

I keep hearing comments that these documents we just produced two weeks ago, they say two weeks ago, but our production of documents was October 17th. It was not just two weeks ago. It was a little bit longer than that. They

have had plenty of time, and from now they have until the depositions, plenty of time to review all of that. The third-party discovery is not justified. They have not been diligent in that respect.

THE COURT: All right.

The motion for an extension of time is denied.

It would help the Court, by the way, if I did have some kind of specifics. I hear a lot of speeches about how diligent the plaintiffs have been, but then I don't get any specificity as to what the problem is with getting discovery from any given third party. When I asked for an example, I didn't get an answer. When I asked for specificity just a few moments ago as to deponents, the people that needed to be deposed, I got some general references to things like the Army in Barstow. I need something more than that to ignore and extend a deadline that was set I think almost eight months ago.

We have a hearing scheduled for next week. Let me ask counsel in light of this ruling will that motion be going on as scheduled?

MR. MILLER: That is our plan, yes.

MR. LOBBIN: I believe so, yes.

THE COURT: I may need to move that an hour or two one way or the other on Thursday. I will let Ron work with you on that.

If I could ask the defendants to prepare an order reflecting the Court's ruling today I would appreciate that.

We are in recess.

MR. MILLER: Your Honor, do you mind if I raise one issue?

THE COURT: Go ahead.

MR. MILLER: We have been talking about claim construction deadlines, the parties have, and we filed this motion this morning. It is a motion to compel regarding claim construction deadlines. Our brief deadline is December 8th, but we have come into something that I think needs some immediate attention from the Court. Mr. Lobbin indicated that he would let me know when he could file an opposition on an expedited basis, and my request would be that maybe the Court could take it up at the end of the summary judgment hearing next week or whenever it could. I have courtesy copies.

THE COURT: Your request is that I move that up and allow a speedier process and handle it at oral argument?

MR. MILLER: I just wanted to let you know that it had been filed and it is kind of a time sensitive issue. It was just filed this morning. They are going to file an opposition, but if we could maybe get the Court's attention on it early next week, or maybe at the latest at the end of the summary judgment hearing next week, that would be great.

THE COURT: By attention, what do you mean?

MR. MILLER: Well, I mean, sometimes you file a motion and then you don't expect the opposition for two weeks and then a reply in --

THE COURT: You're going to get the opposition quicker. Are you going to be filing a reply?

MR. MILLER: We won't need to file a reply.

THE COURT: Then what do you want the Court to do?

MR. MILLER: If we can get a ruling on it sometime next week --

THE COURT: Okay.

MR. MILLER: -- is what I mean. It deals with --

THE COURT: You're asking that I rule on it at the latest at the end of the hearing next week?

MR. MILLER: That would be the best, because it deals with a deadline for the summary judgment briefing.

THE COURT: Would that be the best or the worst? Do you want it before that?

MR. MILLER: The best case scenario would be before that, sure.

THE COURT: You're not specific either. You would like my attention --

MR. MILLER: I could hand this to you now, and --

THE COURT: The most important thing to know is that when the opposition comes in, then it is ripe.

MR. MILLER: Yes.

THE COURT: And you're not going to respond with a reply?

MR. MILLER: Correct.

THE COURT: You would like me to look at it as soon as that opposition is in. Today is Thursday. Your hearing is next Thursday, right?

MR. MILLER: Right.

THE COURT: Well, I will look at it as soon as the opposition comes in. I'll rule on it either before the hearing or at the end of the hearing or during the hearing or sometime that Thursday.

I have taken just a peek at your summary judgment motions, and I have to say they seem like they might be a tad premature. Wouldn't it help me a lot to know more about the claim construction issues before I know whether you're entitled to the relief you seek on summary judgment? You want to tell me that they could have sued us earlier, and I have read that one, at least, and they didn't, and so we have got laches and we have got this Kessler Doctrine coming into play, and we have got this other requirement that they should have sued us then under res judicata or whatever it is. I just barely scanned them.

Then their opposition says, well, it is not exactly the same invention and you need to know about the

differences in the Hydro product since that previous lawsuit. I am thinking to myself, well, that does sound like an issue of fact, and unless I know more about the inventions that existed back during the earlier litigation, and the changes that have been made to your apparatus after that, I don't know how I'm going to be able to rule on those res judicata and laches type of motions. I just wondered if it wasn't all related to things like claim construction.

MR. MILLER: I don't think it is. We put in the affidavit we attached to that motion, we put in the history of our products to explain this is what our product is and how it has changed over the years so that you know that there is no material change that relates to any patent claims.

THE COURT: That is what you say, but that is not what they say.

MR. MILLER: Sure.

Well, they are not going to agree with our position, but the way we did our summary judgment strategy is we picked issues that didn't require claim construction to file early, and then the local patent rules require us to file the summary judgment motions that depend on claim construction with our claim construction briefs. So we have got motions for summary judgment coming in December on noninfringement, but these were more procedural type things

that we are just saying they have known about our products and this patent for 12 years and didn't sue us.

THE COURT: All right. Just as a general proposition if their opposition is that they are using something different now than they used before, in order for me to figure that out, I have got to know what your invention or what your machine or what your apparatus was before and see if the one that they are complaining about now is different enough to make this suit different from the first lawsuit, and that seems to me a lot like I'm going to get into examining the machine and examining the apparatus, and not just the apparatus itself, but, as you would know better than me, that that may involve seeing what was actually patented and what was claimed in their patent and whether your apparatus appears to infringe that. I don't know. I am just thinking out loud, and I was yesterday when I read these, and I don't know that this is going to be easy to do.

MR. MILLER: That is helpful.

I think on that front when they are talking about changes, I think one thing is we can go back to that specificity requirement, and they have got to identify a specific change they think is made that is materially different. We can talk about a specific change if they identify one beyond just saying, well, there have been some

changes and we can't identify them, but there have been some changes. That is not going to be sufficient.

I plan to have some very punchy, colorful charts that will go through the history of these products over time, and it is in the declaration there, but I'm going to put together a good argument chart binder that will go through chart by chart and say 1990s, and here are the wash pads, and 2000s --

THE COURT: Do I have that now in the briefing?

MR. MILLER: No. Those are going to be demonstratives that I'm preparing right now.

THE COURT: So you expect me to sort this all out while you are arguing?

MR. MILLER: I promise I will make it easy.

THE COURT: I don't know about this summary judgment strategy of yours. Tell me this. If, and I surely haven't, but if I ruled in your favor on res judicata, and that is how you style it, right?

MR. MILLER: Right. Claim preclusion, laches or Kessler Doctrine.

THE COURT: Okay.

MR. MILLER: Three options.

THE COURT: I didn't know if you said res judicata or claim preclusion. It is the same thing. It could have been brought earlier and it wasn't, right?

MR. MILLER: Right.

THE COURT: If I rule in your favor on that, what is left?

MR. MILLER: Well, there are three patents and only one of them is at issue in the laches --

THE COURT: Okay.

MR. MILLER: -- only one of the three.

That brings up a good point. One thing we're struggling with here is if that summary judgment motion prevails, then the parties don't need to go through claim construction on that patent anymore.

THE COURT: Well, that is what had me mostly confused.

MR. MILLER: Right.

That is why we filed it early. This is our thought process. If we file this early enough and find out if we can win on the claim preclusion and laches arguments, then we can avoid briefing claim construction which starts December 8th. So if the Court has any inclination of granting that at the hearing next week, I think one request we would have is could we postpone claim construction for just that patent and not the other two --

THE COURT: Until I have ruled?

MR. MILLER: -- until you have ruled, so that the parties don't unnecessarily waste their time doing that

stuff?

THE COURT: Well, I obviously need to read more to get better educated on how many patents there are, but I will do that between now and next Thursday.

Thank you for your arguments today.

Anything else?

MR. MILLER: No.

THE COURT: Thank you.

We'll be in recess.

(Proceedings concluded.)